Nebraska Law Review

Volume 74 | Issue 2 Article 3

1995

Current Dimensions of the Federal Arbitration Act in Nebraska

John M. Gradwohl
University of Nebraska College of Law

Comment

John M. Gradwohl*

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TABLE OF CONTENTS

I. INTRODUCTION

The Nebraska Supreme Court has held categorically that the provisions of the Nebraska Uniform Arbitration Act[1] and "clauses in contracts providing for binding arbitration of future disputes" violate the

* Ross McCollum Professor of Law, University of Nebraska College of Law.

1. NEB. REV. STAT. § 25-2602 (Reissue 1989)(second sentence).

"open courts" provisions of the Nebraska Constitution.[2] Regardless of the success or failure of a proposed amendment of the Nebraska Constitution,[3] the Federal Arbitration Act will be an important part of Nebraska jurisprudence. The Federal Arbitration Act is federal substantive law, which supersedes Nebraska law with respect to arbitrability, and is enforceable in Nebraska courts.[4] Indeed, the Federal Arbitration Act does not confer federal question jurisdiction for federal courts,[5] so most of its enforcement will be in state courts. Recent decisions of the Supreme Court of the United States make clear that the Federal Arbitration Act has broad dimensions. The United States Supreme Court has determined that the Federal Arbitration Act "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause,"[6] defined the respective roles of arbitrators and courts,[7] and set forth rules with respect to choice-of-state-law issues.[8] The purpose of this Commentary is to describe the current dimensions of the Federal Arbitration Act in Nebraska.

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2. State v. Nebraska Ass'n of Pub. Employees, 239 Neb. 653, 657-59, 477 N.W.2d 577, 581-82 (1991). *See* John M. Gradwohl, *Arbitrability In Nebraska*, 70 NEB. L. REV. 381 (1991); John M. Gradwohl, *Historical Perspectives On Nebraska Law Concerning Arbitration Agreements*, 58 NEB. L. REV. 438 (1979).
3. The 1995 Nebraska Legislature adopted a Proposed Constitutional Amendment of the "open courts" provisions, NEB. CONST. art. I, § 13, for submission to voters in May 1996. 1995 Neb. Laws 1CA. A similar 1994 Proposed Constitutional Amendment was invalidated by the Nebraska Supreme Court for the reason that the proposal was not submitted by the Legislature to the Secretary of State within the statutory deadline. State *ex rel.* Wieland v. Beermann, 246 Neb. 808, 523 N.W.2d 518 (1994)(three judges dissenting, but the dissenters would alternatively have held the proposal invalid for failing to explain sufficiently the effects of adopting or rejecting the proposed constitutional amendment).
4. Dowd v. First Omaha Sec. Corp., 242 Neb. 347, 495 N.W.2d 36 (1993).
5. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983):

> The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976 ed., Supp. V) or otherwise. . . . Nevertheless, although enforcement of the Act is left in large part to the state courts, it nevertheless represents federal policy to be vindicated by the federal courts where otherwise appropriate.

6. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 840 (1995)(quoting Perry v. Thomas, 482 U.S. 483, 490 (1987)).
7. First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920 (1995); Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995).
8. Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995); Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989).

II. ARBITRABILITY UNDER NEBRASKA LAW

The Nebraska Supreme Court has "frequently stated the rule that arbitration agreements entered into before a dispute arises oust the courts of jurisdiction and are thus against public policy and therefore void and unenforceable."[9] An arbitration award, however, "whether under the statute or common law, is, in the absence of fraud or mistake, prima facie binding on the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to set aside the decision"—at least if it has the characteristics of a voluntary submission of an existing dispute.[10]

In 1985, the court stated that an agreement to submit an existing dispute to arbitration is enforceable.[11] The language and reasoning in this decision is confusing since the architect had made a determination which the court did not enforce because it was done pursuant to a "future disputes" arbitration provision.[12] There has been no reported Nebraska decision enforcing an executory agreement to arbitrate an existing controversy. The supreme court has not expressly discussed whether or when a "future disputes" arbitration agreement can become an "existing controversy" agreement by action of the parties. In an interesting decision involving a "future disputes" arbitration clause in a merger agreement, the supreme court held that an arbitration award on a cause of action relating to termination of employment was enforceable since one party "voluntarily requested and invoked the arbitration procedure of the merger agreement" and the other party "acquiesced in . . . invocation of the arbitration process."[13] It held, however, that a separate cause of action relating to severance pay, which had not been arbitrated, was not required to be settled by arbitration. The court has also suggested that equitable estoppel might be

9. State v. Nebraska Ass'n of Pub. Employees, 239 Neb. 653, 658, 477 N.W.2d 577, 582 (1991).

10. Babb v. United Food and Commercial Workers Local 271, 233 Neb. 826, 833, 448 N.W.2d 168, 172 (1989). *See* RaDec Constr. Co. v. School Dist. No. 17, 248 Neb. 338, 342-43, 535 N.W.2d 408, 411 (1995)(determination by architect of cost of changes, common law decision not using the term "arbitration").

11. Overland Constructors v. Millard Sch. Dist., 220 Neb. 220, 224-25, 369 N.W.2d 69, 73 (1985). *See* NEB. REV. STAT. § 25-2602 (Reissue 1989)("A written agreement to submit any existing controversy to arbitration is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."). *See also* 1987 Op. Neb. Att'y Gen. 29.

12. Overland Constructors v. Millard Sch. Dist., 220 Neb. 220, 224-25, 369 N.W.2d 69, 73 (1985)("We turn to the next question, whether the parties are bound by the determination made by the architect pursuant to an arbitration clause contained in the contract documents. . . . In the instant case the agreement to arbitrate was entered into before the dispute arose and is therefore unenforceable.").

13. Babb v. United Food and Commercial Workers Local 271, 233 Neb. 826, 833, 448 N.W.2d 168, 172 (1989).

invoked in some circumstances, but the elements of that rule set out by the court make it applicable only in fraudulent circumstances.[14]

III. THE FEDERAL ARBITRATION ACT

A. General Policy

The Federal Arbitration Act was passed in 1925 to declare a national policy favoring the enforcement of contractual arbitration provisions and to prevent states from denying their enforceability.[15] Section 2 of the Federal Arbitration Act provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[16]

A strong line of decisions of the Supreme Court of the United States since 1967 in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[17] has held that the enforceability of an arbitration agreement covered by the Federal Arbitration Act involves federal substantive law. The contract generally remains a state law matter, but issues relating to the enforceability of the arbitration provisions are decided on the basis of the Federal Arbitration Act and not state law.

The Act does not define the phrase "to settle by arbitration." Like the Nebraska cases involving determinations by an architect under construction contracts,[18] the application of the Federal Arbitration

14. *See* State v. Nebraska Ass'n of Pub. Employees, 239 Neb. 653, 659-60, 477 N.W.2d 577, 582 (1991).

15. Perry v. Thomas, 482 U.S. 483, 489 (1987).

16. 9 U.S.C. § 2 (1994).

17. 388 U.S. 395 (1967).

18. For example, compare RaDec Constr. Co. v. School Dist. No. 17, 248 Neb. 338, 535 N.W.2d 408 (1995)(architect's determination binding, no mention of "arbitration"), with Overland Constructors v. Millard Sch. Dist., 220 Neb. 220, 369 N.W.2d 69 (1985)(architect's determination not binding as arbitration award since stemming from a "future disputes" agreement). Appraisal provisions are considered "arbitration" if they are binding on the parties. *See* Rawlings v. Amco Ins. Co., 231 Neb. 874, 438 N.W.2d 769 (1989)(provisions for binding appraisal of the amount of loss under insurance contract held invalid future disputes arbitration agreement); Knigge v. Knigge, 204 Neb. 421, 282 N.W.2d 581 (1979)(petroleum engineer's appraisal binding on parties, arbitration not mentioned in Nebraska Supreme Court decision, but case subsequently cited in *Overland Constructors* and other decisions as an arbitration award); Simpson v. Simpson, 194 Neb. 453, 232 N.W.2d 132 (1975)(appraisers' decision held binding arbitration award).

Act to various methods of appraisals, approvals, reports, and determinations is not always clear.[19]

The phrase "save upon such grounds as exist at law or in equity for the revocation of any contract" invokes state law to determine the validity of the entire agreement with respect to the legal grounds for setting it aside. General state contract law principles apply to the determination of the validity of the contract, but "[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."[20]

B. "Evidencing A Transaction Involving Commerce"

Allied-Bruce Terminix Cos. v. Dobson[21] determined that "the word 'involving' is broad and is indeed the functional equivalent of 'affecting' "[22] and "like 'affecting,' signals an intent to exercise Congress's commerce power to the full."[23] The controversy stemmed from a consumer contract to protect a residence against termites and a guarantee to repair any future damage caused by new termite infestations. The documents contained an arbitration clause that " 'any controversy or claim . . . arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration.' "[24] An Alabama statute provides that predispute arbitration agreements are unenforceable.[25] When the homeowners were unhappy with the company's treatment and brought suit in state court, the company sought a stay in the state

19. *See* IAN R. MACNEIL ET AL., I FEDERAL ARBITRATION LAW § 2.3 (1994):
> The following of these elements are pertinent to a decision whether a particular process is or is not FAA arbitration: (1) the existence of a controversy to be decided by the process; (2) an agreement of the parties to utilize the process; (3) selection by the parties either of the person or persons to resolve the dispute or a process of selection;[footnote omitted] (4) the process is adjudicatory in the broad sense, but not judicial; (5) that the decision of the dispute resolver shall be both final and binding, subject only to the limited judicial review spelled out in the FAA.

20. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 843 (1995). *See* Perry v. Thomas, 482 U.S. 483, 492-93 n.9 (1987).

21. 115 S. Ct. 834 (1995)(7-0 decision on this aspect of the case; Justice Thomas and Justice Scalia did not reach this issue in their dissenting opinions, because, in their view, the Act does not apply in state courts).

22. *Id.* at 839.

23. *Id.* at 841. The decision invalidating the provisions of the Gun-Free School Zones Act making it a federal crime to knowingly possess a firearm near a school zone restated and distinguished, but did not limit, prior decisions concerning Congressional power relating to economic activity. *See* United States v. Lopez, 115 S. Ct. 1624, 1626-31 (1995).

24. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 837 (1995)(emphasis omitted).

25. ALA. CODE § 8-1-41(3) (1975).

court proceedings pending arbitration, on the basis of the Federal Arbitration Act.[26] The Alabama Supreme Court held that the Federal Arbitration Act did not apply because the evidence did "not establish that the parties contemplated substantial interstate activity when they entered the termite bond."[27]

The Supreme Court of the United States reversed the Alabama Supreme Court, rejecting both the "contemplation of the parties" and the "substantial" elements of the Alabama court's interpretation of "transaction involving commerce."[28] The Court adopted a "commerce in fact" standard, rather than the "contemplation of the parties" test or "an 'objective' ('reasonable person' oriented) version of the 'contemplation of the parties' test" urged by an amicus curiae.[29] This interpretation of "evidencing a transaction" means "only that the

26. 9 U.S.C. § 3 (1994).

27. Allied-Bruce Terminix Cos. v. Dobson, 628 So. 2d 354, 356 (Ala. 1993).

28. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834 (1995). The Supreme Court also vacated and remanded three other decisions of the Alabama court for reconsideration in light of *Allied-Bruce Terminix*. Home Buyers Warranty Corp. II v. Lopez, 115 S. Ct. 930 (1995); Terminix Int'l Co. v. Jackson, 115 S. Ct. 930 (1995); Southern Health Corp. v. Lorance, 115 S. Ct. 930 (1995). Following remand, the Supreme Court of Alabama held in each case that there was "a contract evidencing a transaction involving commerce" and that the Federal Arbitration Act preempted Ala. Code § 8-1-41(3) (1975). The cases were further remanded to lower courts for submission to arbitration of the claims covered by the arbitration provisions. However, in Allied-Bruce Terminix Cos. v. Dobson, 1995 Ala. LEXIS 426 (Sup. Ct., November 3, 1995), the court held that the claims of the subsequent purchasers for fraudulent misrepresentation, negligent inspection, and fraudulent concealment at the time of their purchase were unrelated to the previously issued termite protection plan transferred by the sellers, and were not required to be stayed pending arbitration. Terminix International Co. v. Jackson, 1995 Ala. LEXIS 425 (Sup. Ct., November 3, 1995), similarly remanded the case to allow the lower court to consider whether litigation of fraud and negligence claims arising from an inspection prior to a subsequent purchase should be stayed pending arbitration of the termite bond contract claims. Both cases rejected arguments that Terminix had waived its right to arbitration by having participated in the litigation for several months prior to seeking arbitration. Lopez v. Home Buyers Warranty Corporation, 1995 Ala. LEXIS 421 (Sup. Ct., November 3, 1995), stated that the lower court could exercise discretion to determine whether or not related claims against a third party should be stayed pending arbitration. Lorance v. Southern Health Corp., 1995 Ala. LEXIS 427 (Sup. Ct., November 3, 1995), withdrew its previous writ of mandamus setting aside a lower court's order compelling arbitration of tort and contract claims, but stated in a footnote that "Any issues made relevant by this Court's decision after remand in *Allied-Bruce Terminix Cos. v. Dobson* [citation omitted] may be presented to the circuit court." *Id.* at *3 n.1.

29. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 842-43 (1995)("[W]e accept the 'commerce in fact' interpretation, reading the Act's language as insisting that the 'transaction' in fact 'involve' interstate commerce, even if the parties did not contemplate an interstate commerce connection.").

transaction (that the contract 'evidences') must turn out, *in fact*, to have involved interstate commerce[.]"[30]

C. Consumers

Allied-Bruce Terminix also rejected the argument that an objective "contemplation of the parties" test should be applied in order to protect consumers. The Court noted that "Congress, when enacting this law, had the needs of consumers, as well as others in mind,"[31] and that "[i]ndeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."[32] The Court wrote that "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' "[33] The opinion warns that states cannot "place arbitration clauses on an unequal 'footing' " in comparison with the other provisions in the contract.[34]

The Supreme Court subsequently vacated and remanded for further consideration in light of *Allied-Bruce Terminix* a decision of the Montana Supreme Court[35] involving a provision which the Montana legislature added in its enactment of the Uniform Arbitration Act:

> Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.[36]

Following remand, a majority of the Montana court ruled that this statutory notice requirement does not conflict with the Federal Arbitration Act inasmuch as it enhances that arbitration agreements are knowingly entered into.[37] Three judges dissented "because applica-

30. *Id.* at 841.
31. *Id.* at 842.
32. *Id.* at 842-43.
33. *Id.* at 843.
34. *Id.* at 843 (citing Volt Info. Sciences v. Board of Trustees, 489 U.S. 468, 474 (1989)("The Act was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,' *Byrd, supra*, [470 U.S. 213 (1985)] at 219-220, and place such agreements " 'upon the same footing as other contracts,' " *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).").
35. Casarotto v. Lombardi, 886 P.2d 931 (Mont. 1994), *vacated and remanded sub nom.* Doctor's Assocs. v. Casarotto, 115 S. Ct. 2552 (1995).
36. MONT. CODE ANN. § 27-5-114(4) (1993).
37. Casarotto v. Lombardi, 901 P.2d 596, 597-98 (Mont. 1995) ("Montana's notice requirement does not preclude parties from knowingly entering into arbitration agreements, nor do our courts decline to enforce arbitration agreements which are entered into knowingly.... Our state law simply requires that the parties be adequately informed of what they are doing before they enter into an arbitration agreement.").

tion of that statute undercuts, undermines and renders unenforceable the parties' agreement to arbitrate."[38] The notice issue seems likely to require resolution by the Supreme Court, where Justice O'Connor, at least, has indicated that the requirement conflicts with the Federal Arbitration Act.[39]

D. Enforceability in State Courts/Preemption of State Laws

Allied-Bruce Terminix also reaffirms that the substantive provisions of the Federal Arbitration Act are applicable in state court proceedings and supersede any state law to the contrary. Twenty state attorneys general, including the Attorney General of Nebraska, filed an amicus curiae brief asking the Court to overrule its 1984 decision in *Southland Corp. v. Keating*.[40] A seven Justice majority of the Court reexamined *Southland* and again held that the substantive rules of the Federal Arbitration Act are applicable in state courts. Chief Justice Rehnquist and Justice O'Connor, who dissented in *Southland*, joined in the opinion of the Court. Justice O'Connor explained that she did so "because there is no 'special justification' to overrule *Southland*."[41] Justice Thomas, joined by Justice Scalia, dissented for the reason that in his view, the Federal Arbitration Act does not apply in state courts.[42]

E. Choice-Of-Law Issues

Just as the parties are free to contract as they agree with respect to all contractual terms, including whether or not to resolve some or all

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38. *Id.* at 600 (Gray, J., dissenting).
39. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 843 (1995)(O'Connor, J., concurring):
> The reading of § 2 adopted today will displace many state statutes carefully calibrated to protect consumers, see, *e.g.*, Mont.Code Ann. § 27-5-114(2)(b) (1993) (refusing to enforce arbitration clauses in consumer contracts where the consideration is $5,000 or less), and state procedural requirements aimed at ensuring knowing and voluntary consent, see, *e.g.*, S.C.Code Ann. § 15-48-10(a) (Supp.1993) (requiring that notice of arbitration provision be prominently placed on first page of contract).
40. 465 U.S. 1 (1984).
41. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 844 (1995)(O'Connor, J., concurring)("After reflection, I am persuaded by considerations of *stare decisis*, which we have said 'have special force in the area of statutory interpretation,' . . . to acquiesce in today's judgment. Though wrong, *Southland* has not proved unworkable, and, as always, 'Congress remains free to alter what we have done.' ").
42. *Id.* at 845 (Thomas, J., dissenting). Justice Scalia additionally rejected the effect of *stare decisis* as to Southland, stating that he "stand[s] ready to join four other Justices in overruling it, since *Southland* will not become more correct over time, the course of future lawmaking seems unlikely to be affected by its existence . . . and the accumulated private reliance will not likely increase beyond the level it has already achieved (few contracts not terminable at will have more than a 5-year term)." *Id.* (Scalia, J., dissenting).

of their disputes by arbitration, they are free to choose the law applicable to their agreement and to designate the arbitration procedures by which the disputes will be settled.[43] "[O]rdinary state-law principles that govern the formation of contracts" generally apply in "deciding whether the parties agreed to arbitrate a certain matter."[44] The role of the Federal Arbitration Act is to enforce whatever agreement to arbitrate the parties have made, despite "ordinary state-law principles" which might deny or limit the enforceability of arbitration on a ground different than would apply to "any contract."

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[45] Shearson's standard form Client's Agreement contained a choice-of-state-law provision that it " 'shall be governed by the laws of the State of New York' " and an arbitration provision (as described by the Court) "that 'any controversy' arising out of the transactions between the parties 'shall be settled by arbitration' in accordance with the rules of the National Association of Securities Dealers (NASD), or the Boards of Directors of the New York Stock Exchange and/or the American Stock Exchange."[46] Clients filed suit in federal court in Illinois claiming mismanagement of their account. The proceedings were stayed pending arbitration. The arbitration panel ruled in favor of the clients, including punitive damages of $400,000 under the NASD's arbitration rules in addition to compensatory damages of $159,327. The district court and the court of appeals vacated the award of punitive damages on the basis of New York law that only courts, but not arbitrators, have authority to award punitive damages.[47]

The Supreme Court reversed the lower courts, resting its decision on an interpretation of the agreement of the parties applying New York rules of contract interpretation. It stated that "the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties," and "if contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."[48] It reasoned that had the agreement been exe-

43. Volt Info. Sciences v. Board of Trustees, 489 U.S. 468 (1989)(holding that the parties' choice of California law included a procedural statute allowing a court to stay arbitration pending the outcome of proceedings with a third party arising out of the same transaction or a series of transactions, and that there is a possibility of conflicting rulings on a common issue of law or fact).

44. First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1924 (1995)(discussed *infra* as to the respective authority of courts and arbitrators to decide issues pertaining to arbitrability).

45. 115 S. Ct. 1212 (1995)(8-1 decision; with Thomas, J., dissenting).

46. *Id.* at 1217.

47. *Id.* at 1215.

48. *Id.* at 1216.

cuted in New York without a choice-of-law provision, "there would be nothing in the contract that could possibly constitute evidence of an intent to exclude punitive damages claims,"[49] and "punitive damages would be allowed because, in the absence of contractual intent to the contrary, the FAA would pre-empt the *Garrity* rule [that the power to award punitive damages is limited to judicial tribunals and may not be exercised by arbitrators]."[50] It interpreted the choice-of-New York-law provision to "encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators," holding that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration."[51]

F. Authority Of Arbitrators and Courts To Decide Issues Of Arbitrability

First Options of Chicago, Inc. v. Kaplan,[52] defined the authority of arbitrators and federal courts to resolve issues relating to arbitrability, discussing both determinations of whether a party has agreed to arbitrate and the subject matter covered by the arbitration agreement. As in previous decisions, the Court stated that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."[53] Once again, the Court stated that "ordinary state law principles that govern the formation of contracts" apply in "deciding whether the parties agreed to arbitrate a certain matter (including arbitrability)," but the Court added an "important qualification" with respect to determining whether a party had agreed to the arbitration process itself.[54]

Manuel and Carol Kaplan wholly owned MK Investments, Inc. ("MKI"). After the 1987 stock market crash, the Kaplans and MKI signed four documents relating to a "workout" agreement for debts owed to First Options which had handled MKI's trading accounts. Only the document between MKI and First Options, which the Kaplans had not personally signed, contained an arbitration clause. After further losses by MKI, First Options sought arbitration of its claims against MKI and the Kaplans. MKI agreed to arbitrate with First Options, but the Kaplans objected that the claims against them

49. *Id.* at 1217.
50. *Id.*
51. *Id.* at 1219. ("[N]either sentence intrudes upon the others. In contrast, respondents' reading sets up the two clauses in conflict with one another: one foreclosing punitive damages, the other allowing them.").
52. 115 S. Ct. 1920 (1995).
53. *Id.* at 1924.
54. *Id.*

individually were not arbitrable since they had not personally signed an agreement to submit to arbitration.

The arbitrators determined that they had authority to rule on the entire dispute. In a five to two decision, the arbitration panel pierced the corporate veil and entered an award for $5,662,188.00 plus interest against MKI and Manuel Kaplan jointly and severally.[55] The arbitration award was confirmed by the district court. The court of appeals affirmed the district court's confirmation of the award against MKI, but vacated the arbitration award against the Kaplans individually. It held that a district court should independently determine whether an arbitrator has jurisdiction to decide the dispute, and that the Kaplans had not personally agreed to arbitration with First Options.[56]

The Supreme Court affirmed the court of appeals decision, concluding "that, because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts."[57] Since the agreement did not specify whether the parties had agreed to arbitrate issues of arbitrability, the Court carefully differentiated between " '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' " and " '*who* (primarily) should decide arbitrability.' "[58]

With respect to " '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement,' " a court "must defer to an arbitrator's arbitrability decision,"[59] "[t]hat is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances."[60] The Supreme Court, however, "added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[61] The Court

55. *See* Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1508 (3d Cir. 1994). The Kaplans were also ordered to turn over their 1987 tax refund, $346,342.00, plus interest, to First Options, enforcing a provision contained in a document signed by them but which did not contain an arbitration clause.

56. *Id.*

57. First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1925-26 (1995).

58. *Id.* at 1924.

59. *Id.*

60. *Id.* at 1923. The decision also restates from previous decisions that " '[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' " *Id.* at 1924.

61. *Id.* at 1924 (brackets in original)(citing Labor Management Relations Act decisions, AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986) and Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)).

reasoned that "when the parties have a contract that provides for arbitration of some issues . . . , the parties likely gave at least some thought to the scope of arbitration."[62] Here, the rules resolve doubts in favor of arbitration and "insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter."[63] It also reasoned that a party "often might not focus upon" the question of having an arbitrator decide the jurisdictional aspects of arbitrability "or upon the significance of having arbitrators decide the scope of their own powers."[64] It explained further:

> And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.[65]

The Court concluded that the record did not establish that the Kaplans had clearly agreed to submit to arbitration. The standard of review by a court of appeals of a district court decision confirming an arbitration award is the normal standard of "accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*."[66] The holding of the court of appeals, that the arbitrability of First Options' dispute with the Kaplans individually was subject to independent review by the courts, was affirmed.

G. "Seamen, Railroad Employees, or Any Other Class of Workers Engaged in Commerce"

Section 1 of the Federal Arbitration Act states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[67] Arbitration under private sector collective bargaining agreements and causes of action which are "inextricably intertwined" with consideration of the terms of a collective bargaining agreement are covered by Section 301 of the federal Labor Management Relations Act, rather than the Federal Arbitration Act or Nebraska arbitration rules.[68]

There is an indication in *Allied-Bruce Terminix* that the Court would give the phrase "engaged in foreign or interstate commerce" a narrower interpretation than "involving commerce" or "affecting com-

62. *Id.*
63. *Id.*
64. *Id.* at 1925.
65. *Id.*
66. *Id.* at 1926.
67. 9 U.S.C. § 1 (1994).
68. Robinson v. Cushman, Inc., 242 Neb. 830, 496 N.W.2d 923 (1993).

merce."[69] It stated that the words "involving commerce" (which it held are the "functional equivalent" of "affecting commerce"[70] and "normally mean a full exercise of constitutional power"[71]) "are broader than the often-found words of art 'in commerce.' "[72] It cited prior decisions "defining 'in commerce' as related to the 'flow' and defining the 'flow' to include 'the generation of goods and services for interstate markets and their transport and distribution to the consumer.' "[73] The scope of "engaged in foreign or interstate commerce" in the exclusionary language of § 1 remains unresolved by the Supreme Court,[74] as do definitive interpretations of the terms "contracts of employment," "class," and "workers."[75]

IV. ENFORCEABILITY IN NEBRASKA STATE COURTS

A. In General

The one Nebraska Supreme Court decision to date applying the Federal Arbitration Act is *Dowd v. First Omaha Securities Corp.*[76] The Dowds claimed that their margin accounts were wrongfully liquidated by their broker, First Omaha Securities. The "customer agreement" contained an arbitration clause and a choice-of-laws provision that Nebraska law would govern the contract. The Dowds sued First Omaha Securities in Nebraska state district court on three causes of action: breach of contract, negligence, and breach of fiduciary duty. The district court stayed the judicial proceeding pending arbitration on the authority of the Federal Arbitration Act.[77] After an arbitration award in favor of First Omaha Securities, the district court denied the

69. Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 839 (1995).
70. *Id.* at 841.
71. *Id.*
72. *Id.* at 839.
73. *Id.*
74. The issue was expressly left open in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991) for the reasons that the issue had not been raised by the parties in the lower courts and the arbitration requirement was in a New York Stock Exchange rule rather than an employment agreement.
75. *See generally* MACNEIL ET AL., *supra* note 19, ch.11 (The FAA and Labor Contracts: Collective and Individual)(1994). *See also* Gradwohl, *Arbitrability In Nebraska*, *supra* note 2, at 404-07.
76. 242 Neb. 347, 495 N.W.2d 36 (1993). Other cases would probably have been decided on the basis of the Federal Arbitration Act had the parties raised that issue. *See, e.g.*, Babb v. United Food and Commercial Workers Local 271, 233 Neb. 826, 448 N.W.2d 168 (1989); Overland Constructors v. Millard Sch. Dist., 220 Neb. 220, 369 N.W.2d 69 (1985).
77. Dowd v. First Omaha Sec. Corp., 242 Neb. 347, 350-51, 495 N.W.2d 36, 38-39 (1993)("In this case, the district court had no alternative but to grant a stay pending arbitration. The FOS-Dowd contract is governed by the Federal Arbitration Act. . . . [I]t is clear that the district court correctly stayed the Dowd-FOS litigation pursuant to FAA § 3.").

Dowds' motion to vacate the arbitration decision and granted First Omaha Securities' motion to confirm the award. On appeal, the supreme court affirmed.

The decision resolves a number of important issues concerning the enforceability of the Federal Arbitration Act in Nebraska state courts. The opinion states that the Federal Arbitration Act preempts and supersedes the Nebraska state constitutional provisions with respect to the issue of arbitrability.[78] It emphasizes language from the United States Supreme Court that the Federal Arbitration Act "creates 'a body of federal substantive law of arbitrability, applicable to *any* arbitration agreement within the coverage of the Act.' "[79] It twice quotes the following language from *Southland Corp. v. Keating*:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.[80]

The Court noted that the agreement to buy and sell securities "directly involved interstate commerce."[81] In future cases following *Allied-Bruce Terminix*, the standard will be "affecting commerce."

The decision also applied the provisions of the Federal Arbitration Act in refusing to vacate the arbitration award on the grounds of alleged "evident partiality" of one of the arbitrators.[82] And the Court rejected the Dowds' argument that the Federal Arbitration Act was not applicable to their Nebraska common law causes of action brought in Nebraska courts for breach of contract, negligence, and breach of a fiduciary duty.[83]

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78. *Id.* at 350, 495 N.W.2d at 38 ("The Supremacy Clause of the U.S. Constitution dictates that state law, including constitutional law, is superseded to the extent it conflicts with federal law. . . . Therefore, this court's holdings that a predispute agreement to compel arbitration is void are preempted to the extent they conflicted with the FAA.").

79. *Id.* at 354, 495 N.W.2d at 41 (quoting Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983))(emphasis supplied by Nebraska Supreme Court).

80. *Id.* at 351, 354, 495 N.W.2d at 39, 41 (quoting Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984)).

81. *Id.* at 351, 495 N.W.2d at 39 ("As such, as required by §§ 1 and 2 of the FAA, it directly involved interstate commerce.").

82. *Id.* at 356, 495 N.W.2d at 42.

83. *Id.* at 355, 495 N.W.2d at 41. Some Nebraska claims are not pre-empted by the Federal Arbitration Act, such as workers' compensation and those involving the "business of insurance." Whether claims under other federal statutes can be made arbitrable by virtue of the Federal Arbitration Act depends upon Congressional intention in the enactment of the other statutes. *See* Gradwohl, *Arbitrability In Nebraska*, *supra* note 2, at 400-04.

B. Determination Of "Such Grounds As Exist At Law Or In Equity For The Revocation Of Any Contract"

The Dowds did not claim that the contract was unenforceable other than as to its arbitration provisions. It was not necessary in that decision to consider by whom a determination should be made regarding "such grounds as exist at law or in equity for the revocation of any contract."[84]

Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,[85] however, held that claims of fraud in the inducement of the entire contract are for an arbitrator to decide by virtue of the substantive provisions of the Federal Arbitration Act, notwithstanding state law to the contrary.[86] The role of courts is to decide issues directed to the making of the arbitration provision in particular.[87] Judge Beam explained this "counterintuitive" result in an opinion of the Court of Appeals for the Eighth Circuit:

> In *Prima Paint*, the Supreme Court distinguished between fraud in the inducement of the entire contract and fraud in the inducement of the arbitration clause alone. "[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it." *Id.* at 403-04, 87 S.Ct. at 1806. However, a claim of fraud in the inducement of the contract generally, because it does not go to the "making and performance of the agreement to arbitrate," is properly left to arbitration. *Id.* at 404, 87 S.Ct. at 1806. Thus, a court can consider a claim that a party was fraudulently induced to include an arbitration clause in a contract, but not a claim that an entire contract was the product of fraud. . . . As counterintuitive as it may seem, under *Prima Paint* a dispute over the making of a contract can arise out of that same contract, and thus be subject to arbitration.[88]

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84. The opinion seems to assume that a court ought to make this determination prior to finding that the Federal Arbitration Act is applicable. Dowd v. First Omaha Sec. Corp., 242 Neb. 347, 351, 495 N.W.2d 36, 39 (1993)("Aside from particular provisions of Nebraska law regarding arbitration, there is no allegation in the Dowds' petition or motion to dissolve the stay that the contract was unenforceable in law or equity. Therefore, the FAA applies.").

85. 388 U.S. 395 (1967).

86. *Id.* at 402 ("Having determined that the contract in question is within the coverage of the Arbitration Act, we turn to the central issue in this case: whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators.").

87. *Id.* at 402-04. Justice Black, joined by Justices Douglas and Stewart, wrote a strong dissent on this issue:

> The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so.

Id. at 407 (Black, J., dissenting).

88. Houlihan v. Offerman & Co., 31 F.3d 692, 695 (8th Cir. 1994).

These rules are applicable in state court proceedings by virtue of *Southland Corporation* and *Allied-Bruce Terminix*. They are also completely consistent with the allocation of authority between courts and arbitrators as defined in *First Options of Chicago*.

C. Choice-Of-Nebraska-Law

The Dowds contended that the choice-of-law provision in the customer agreement, that Nebraska law would govern the contract, included Nebraska law as to the unenforceability of future disputes arbitration provisions. The Court treated this as a matter of federal substantive law, stating "[t]he U.S. Supreme Court has directly addressed situations similar to the case at bar and has held that state law, even when incorporated by a choice-of-law provision, cannot prevent the enforcement of an arbitration clause otherwise valid under the FAA."[89]

D. Rules Of Arbitration Procedure

Mastrobuono and *Volt Information Sciences* make clear that the parties can agree upon the rules of procedure to be followed in the arbitration process, rather than relying upon the procedural provisions of the Federal Arbitration Act. In *Mastrobuono*, the rules of the National Association of Securities Dealers were agreed to by the parties and were the basis for an award of punitive damages. In *Volt Information Sciences*, California procedural rules were agreed to by the parties and meant that the arbitration was stayed pending a judicial determination of third party claims. Agreements specifying procedural rules for the arbitration will be effective so long as they are "consistent with the federal policy 'to ensure the enforceability, according to their terms, of private agreements to arbitrate.' "[90]

E. Punitive Damages

It is unclear whether an arbitrator might have authority to award punitive damages in various situations involving a Nebraska contract, despite Nebraska's long standing state constitutional prohibition and

89. Dowd v. First Omaha Sec. Corp., 242 Neb. 347, 354, 495 N.W.2d 36, 41 (1993). In addition to *Southland Corporation* and *Volt Information Sciences* cited in the opinion, see Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1215-16 (1995) and Perry v. Thomas, 482 U.S. 483 (1987).

90. Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1216 (1995)(quoting Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 476 (1989)). *See* Dowd v. First Omaha Sec. Corp., 242 Neb. 347, 495 N.W.2d 36 (1993)(American Arbitration Association Securities Arbitration Rules); Wiekhorst Bros. Excavating & Equip. Co. v. Sanitary and Improvement Dist. No. 337, 232 Neb. 377, 440 N.W.2d 488 (1989)(American Arbitration Association Construction Industry Arbitration Rules).

strong public policy against punitive damages. The *Mastrobuono Court* stated, "[W]e think our decisions in *Allied-Bruce*, *Southland*, and *Perry* make clear that if contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."[91] The contract contained a choice-of-New York-law clause and arbitration provisions which the Court interpreted to authorize punitive damages. New York's "*Garrity* rule" allows courts, but not arbitrators, to award punitive damages, which the Supreme Court of the United States noted "is not, in itself, an unequivocal exclusion of punitive damages claims."[92] In the course of interpreting the contract of the parties, the Court discussed a hypothetical fact situation of a similar contract signed and performed in New York containing the arbitration provision but without a choice-of-law provision. The Court's view was: "In such event, there would be nothing in the contract that could possibly constitute evidence of an intent to exclude punitive damages claims. Accordingly, punitive damages would be allowed because, in the absence of contractual intent to the contrary, the FAA would pre-empt the *Garrity* rule."[93]

On the other hand, Nebraska has an unequivocal public policy against punitive damages and Nebraska law invalidates punitive damage provisions in "any contract." Nebraska has a constitutional prohibition against statutes imposing damages in excess of compensatory or actual damages.[94] A stipulated sum is allowable as liquidated damages under a contract " 'only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach.' "[95] Nebraska will give full faith and credit to a punitive damages judgment of a foreign state having jurisdiction of the parties, but it will not apply a statute of another state which offends the policy of Nebraska against "punitive, vindictive, or exemplary damages."[96] It can cer-

91. Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1216 (1995).

92. *Id.* at 1217.

93. *Id.* The Court also recognized that "the parties to a contract may lawfully agree to limit the issues to be arbitrated by waiving any claim for punitive damages." *Id.* at 1216.

94. Distinctive Printing & Packaging Co. v. Cox, 232 Neb. 846, 443 N.W.2d 566 (1989); Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960).

95. Kozlik v. Emelco, Inc., 240 Neb. 525, 537, 483 N.W.2d 114, 121 (1992)(quoting Gowney v. C M H Real Estate Co., 195 Neb. 399, 401, 238 N.W.2d 240, 242-43 (1976)).

96. Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975).

tainly be argued that a Nebraska contract containing an agreement for a remedy of punitive damages falls within the language of the Federal Arbitration Act, "such grounds as exist at law or in equity for the revocation of any contract."[97]

If the contract does not contain express language on punitive damages, each situation will call for an interpretation of whether the agreement of the parties contains authority for an arbitrator to award punitive damages. *Mastrobuono* interpreted the agreement of the parties to mean that they had agreed to arbitration pursuant to the rules of the National Association of Securities Dealers, which included authority for an arbitrator to consider and award punitive damages. Noting that *Mastrobuono* stated that "the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages,"[98] a lower New York court held that a party, represented by counsel, who chose to arbitrate under rules specifying New York City as the venue for the arbitration, also chose the New York punitive damages rule, and that an arbitrator's award of punitive damages would "almost certainly be vacated under the authority of *Garrity*."

F. Judicial Review Of Arbitration Awards

From *Allied-Bruce Terminix* and *Southland Corp.*, it would seem that state procedures subjecting awards under the Federal Arbitration Act to greater judicial scrutiny than provided under that Act would, in the absence of agreement by the parties, be preempted by the federal statutes.[99] But the Supreme Court of the United States has not yet adjudicated the extent to which the federal statutes specifying the grounds for judicial review are a part of the federal substantive law controlling in state courts.

Dowd v. First Omaha Securities Corp.[100] applied the Federal Arbitration Act in refusing to vacate the arbitration award on the basis of alleged "evident partiality" of one of the arbitrators. Both the Federal Arbitration Act[101] and Nebraska statutes[102] authorize a court to va-

97. 9 U.S.C. § 2 (1994).
98. Dean Witter Reynolds, Inc. v. Trimble, 1995 N.Y. Misc. LEXIS 402 (Sup. Ct. N.Y. County, June 13, 1995)(quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212, 1216 (1995)).
99. *See* Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834, 838 (1995)("In *Southland Corp. v. Keating*, *supra* [465 U.S. 1 (1984)], this Court decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases. The Court concluded that the Federal Arbitration Act pre-empts state law; and it held that state courts cannot apply state statutes that invalidate arbitration agreements.").
100. 242 Neb. 347, 495 N.W.2d 36 (1993).
101. 9 U.S.C. § 10(a)(2) (1994).
102. NEB. REV. STAT. § 25-2613(b) (Reissue 1989).

cate an arbitration award for "evident partiality" of an arbitrator. The Nebraska Supreme Court stated that its decision was based on the federal statute, "which we have determined to be controlling."[103]

It is also a part of federal substantive law that "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances."[104] *First Options of Chicago* noted that "where the party has agreed to arbitrate, he or she, in effect, has relinquished much of . . . [the] practical value [of a right to a court's decision about the merits of its dispute]. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances."[105]

Dowd applied essentially the same standard as *First Options of Chicago* in appellate review of a lower court's confirmation of an arbitration award. Applying Nebraska law, it stated that "an appellate court does not reweigh the evidence, but considers it in the light most favorable to the successful party, resolving evidentiary conflicts in favor of that party."[106] *First Options of Chicago* applied a standard of "accepting findings of fact that are not 'clearly erroneous.' "[107] Both decisions considered questions of law *de novo* on appeal.

V. CONCLUSION

In 1967, the Supreme Court of the United States held that the Federal Arbitration Act is substantive law defining the enforceability of arbitration agreements. In 1984, the Court held that the Act is applicable in proceedings in state courts, preempting state rules to the contrary. The Nebraska Supreme Court applied these rules for the first time in 1993 in *Dowd v. First Omaha Securities Corp.*, preempting long-standing Nebraska constitutional prohibitions against the enforceability of agreements to arbitrate disputes between the parties arising in the future. The Supreme Court of the United States in 1995 decided three very important Federal Arbitration Act cases. It held that the Act applies to transactions "affecting commerce," and invokes the "full reach of the Commerce Clause." It stated and applied rules for the interpretation of the agreements of the parties relating to substantive arbitrability, arbitration procedures, and choice-of-state-law

103. Dowd v. First Omaha Sec. Corp., 242 Neb. 347, 356, 495 N.W.2d 36, 42 (1993).
104. First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1923 (1995). Nebraska law requires that for the evidence presented at an arbitration hearing to be considered by a court, a bill of exceptions of the arbitration hearing must be offered into evidence in the district court. Wiekhorst Bros. Excavating & Equip. Co. v. Sanitary and Improvement Dist. No. 337, 232 Neb. 377, 440 N.W.2d 488 (1989).
105. First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1923 (1995)(giving as illustrations, award procured by corruption, fraud, or undue means; arbitrator exceeded his powers; and "manifest disregard" of the law).
106. Dowd v. First Omaha Sec. Corp., 242 Neb. 347, 360, 495 N.W.2d 36, 44 (1993).
107. First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1926 (1995).

issues. It gave further guidance on the respective roles of arbitrators and courts. All of this strongly suggests that the impact of the Federal Arbitration Act in Nebraska will be much greater in the future than it has been in the past.